

*In the Matter of Leo Bende,*

Docket No. 2005-4742

**(Merit System Board, decided February 22, 2006)**

The appeal of Leo Bende, a County Correction Officer with Burlington County of his removal, effective April 8, 2005, on charges, was heard by Administrative Law Judge Solomon A. Metzger (ALJ), who rendered his initial decision on January 12, 2006. Exceptions were filed on behalf of the appointing authority, and cross-exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on February 22, 2006, accepted and adopted the Findings of Fact as contained in the attached ALJ's initial decision, but did not adopt the recommendation to modify the removal to a 30-day suspension. Rather, the Board imposed a 60 calendar day suspension.

## **DISCUSSION**

The appellant was charged with conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that, on September 1, 2004, the appellant threatened and assaulted a supervisor at a Shop Rite supermarket while he was in uniform. As a result of the incident, the appellant was charged with harassment and simple assault; the criminal charges were later amended to a municipal offense of disturbing the peace, to which the appellant pled guilty and paid a fine. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case.

In his initial decision, the ALJ found that there was essentially no dispute regarding the facts. In this regard, the ALJ found that the appellant, a father of a 16-year old daughter, returned home from work on the night of August 31, 2004 to find his daughter upset and crying. His daughter would not disclose the source of her distress to the appellant. At approximately 1:50 p.m. on September 1, 2004, as the appellant was preparing to depart for his 3:00 p.m. to 11:00 p.m. shift at work, his estranged wife contacted him to explain their daughter's emotional state. His wife informed him that a 21-year old man, who was their daughter's supervisor at Shop Rite, had "lured their daughter into a trailer on the [Shop Rite] property and induced her to perform oral sex." The appellant's wife also informed him that the individual later bragged about his conquest to several other employees, labeling the appellant's daughter the "store whore." Upon learning of these events, the appellant, who was on his way to work and in uniform, proceeded to the Shop Rite to confront his daughter's supervisor. When he identified himself, the individual "snickered" and asked the appellant "what are you going to do about it?" The

appellant reacted to this behavior by grabbing the individual by the shoulders and shoving him. However, immediately realizing that he was in uniform and acting inappropriately, the appellant stopped himself and left the store. Based on these undisputed facts, the ALJ recommended upholding the disciplinary charges against the appellant. However, taking into consideration the circumstances surrounding the appellant's momentary lapse of judgment, the fact that no injuries resulted, and the fact that the appellant's only prior discipline, a 20-day suspension, was on charges that did not relate to abuse or bullying, the ALJ recommended modifying the removal to a 30-day suspension.

In its exceptions to the ALJ's initial decision, the appointing authority contends that the ALJ improperly excused the appellant's egregious conduct by the fact that no one was physically injured. The appointing authority maintains that the appellant's behavior created a potential for harm, which should have been a consideration in assessing the proper penalty. The appointing authority also emphasizes that the appellant's actions, which essentially amounted to "tak[ing] the law into his own hands," are particularly egregious for an individual in a law enforcement position who is sworn to enforce and uphold the law. Further, the appointing authority contends that the appellant's disciplinary history supports his removal, since his prior 20-day suspension involved a "breach of the Jail's security protocols." Thus, the appointing authority urges the Board to uphold the penalty of removal.

In response, the appellant acknowledges that he acted inappropriately and momentarily lost his temper. However, he emphasizes the events that triggered his reaction: the sexual exploitation of his 16-year old daughter. In addition, the appellant underscores that, although he momentarily lost his temper and physically assaulted the individual responsible for his daughter's emotional state, he immediately regained his composure and removed himself from the situation. Therefore, the appellant contends that the ALJ's initial decision, recommending a 30-day suspension, should be upheld.

While the Board agrees with the ALJ's determination with respect to the charges, the Board disagrees with the ALJ's recommendation that a 30-day suspension is the proper penalty. Rather, the Board finds that a 60 calendar day suspension is the appropriate penalty. In determining the proper penalty, the Board's review is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Board utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). Although the Board applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway*, 81 N.J. 571, 580 (1980). In the instant matter, the seriousness of the appellant's conduct cannot be ignored. The appellant was involved in an altercation

with another individual in a public place while in uniform. In this regard, the Board emphasizes that a Correction Officer is a law enforcement officer who, by the very nature of his job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong*, 89 N.J. Super. 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also In re Phillips*, 117 N.J. 567 (1990). This standard of conduct is particularly applicable where, as here, the appellant's actions essentially represented "taking the law into his own hands." Further, it must be noted that the appellant was a short-term employee, having been employed since July 2000, and he previously served a 20-day suspension on disciplinary charges. Clearly, taking these factors into consideration, the appellant's conduct warrants a significant disciplinary penalty to ensure that he is aware of the seriousness of his offense and dissuaded from repeating such behavior. Nevertheless, the Board agrees with the ALJ that, given the events to which the appellant was reacting, removal would be too harsh a penalty. Although the proper course of action would have been to contact the police upon learning of his daughter's sexual assault, the Board empathizes with the emotional reaction that the appellant experienced. Accordingly, the Board concludes that a 60 calendar day suspension is the appropriate penalty.

Since the penalty has been modified from a removal to a 60 calendar day suspension, the appellant is entitled to mitigated back pay, benefits and seniority for the period following the suspension to the date of actual reinstatement pursuant to N.J.A.C. 4A:2-2.10.

N.J.A.C. 4A:2-2.12(a) provides for the award of reasonable counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div., March 18, 2004); *Johnny Walcott v. City of Plainfield*, 282 N.J. Super. 121, 128 (App. Div. 1995); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Board, the charges were sustained. Consequently, as the appellant has failed to meet the standard set forth at N.J.A.C. 4A:2-2.12(a), counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Board's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

## ORDER

The Merit System Board finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Board modifies the removal to a 60 calendar day suspension. The Board further orders that the appellant be granted back pay, benefits and seniority for the period following the suspension to the date of actual reinstatement. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by the appellant during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

The parties must inform the Board, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Board will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.